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was rather broad, basing the dissolution of the contract on impossibility of performance due to the "non-existence of the state of things assumed by both contracting parties as the foundation of the contract," whether this state of things was mentioned in the contract or not. The cases arising out of the war have not tended to enlarge that language. In *Horlock v. Beal* [1916] 1 A. C. 486, the House of Lords applied the rule to the case of a seaman's contract of service, where the ship and crew were interned in a German port, and held that the contract was dissolved. In *F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.* [1916] 2 A. C. 397, it was held that the requisition of a ship by the government for war purposes did not put an end to a five years' contract for the use of the ship, though LORDS HALDANE and ATKINSON dissented and LORD LOREBURN said he would be of a different opinion if it were established (as events doubtless did establish) that the ship would be used by the government for substantially the remainder of the five years, for in such an event the contracting parties would have been so placed "that as sensible men they would have said, 'if that happens, of course it is all over between us.'" In *Shipton, Anderson & Co. v. Harrison Brothers & Co.* [1915] 3 K. B. 676, a contract for the sale of specific wheat was held to be dissolved by implied condition when the wheat was requisitioned by the government. In *Metropolitan Water Board v. Dick, Kerr & Co.* (1918) 87 L. J. K. B. 370, a contract for the construction of certain reservoirs was stopped and the plant and materials sold by order of the Minister of Munitions, and it was held by the House of Lords, on very full consideration, that the impossibility of performance created by law excused the contractor from performance.

In the principal case the court was unable to say that the continuance of the normal mode of shipping timber from Finland was a matter which both parties contemplated as necessary for the fulfilment of the contract. The buyers were not interested in the means or the route by which the sellers should make delivery, and it appeared that they were in fact unaware how the timber was to be shipped or whether it might not be already held in stock in England. The rule was doubtless properly applied. It is a rule which must be applied with caution, for "if it be extended too far," as said by MCCARDIE, J., in giving judgment in the court below, "it may tend to sap the foundations of contract law as they now exist." E. R. S.

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DEEDS TO TAKE EFFECT UPON DEATH OF GRANTOR.—That instruments in form of wills may be effective as deeds of conveyance is clear. If a present interest is passed and execution is complete (which includes delivery), the instrument must take effect as a deed. On the other hand, if no interest is to vest until or after death of the maker and there has been no complete execution as a deed, the instrument, if operative at all, must take effect as a will. Difficulties arise when there is a fully executed deed, which, however, is to be postponed in its complete operation until the death of the grantor.

Where the grantor delivers the deed to a third party to be handed by him to the grantee on the grantor's death there is substantial agreement among

the courts that such instrument is not ineffective as an attempted testamentary disposition. The cases of *Felt v. Felt*, 155 Mich. 237; and *O'Brien v. O'Brien*, 19 N. D. 713, cited by Professor Tiffany in 14 Col. L. Rev. 404, as holding the other way are explained on the ground that there had been no delivery of the deeds. The chief differences of opinion in this class of cases has been as to the time when and the extent to which such deeds divest the grantor of ownership. See 16 MICH. LAW REV. 586, where the matter is discussed.

The real difficulty arises when the grantor inserts into the deed a provision in substance that "this deed shall take effect upon the death of the grantor." In a number of cases it has been held that such provision makes the deed an attempted testamentary disposition and as such void for lack of proper execution. *Turner v. Scott*, 51 Pa. 126; *Sperber v. Balster*, 66 Ga. 317 (Cf. *White v. Hopkins*, 80 Ga. 154); *Pinkham v. Pinkham*, 55 Neb. 729; *Bigley v. Souvey*, 45 Mich. 370; *Shaull v. Shaull*, (Iowa) 160 N. W. 36. The leading American case appears to be *Turner v. Scott*, *supra*, which seems to depend not a little upon the slender foundation of *Habergham v. Vincent*, 2 Ves. Jr. 204.

In quite a number of jurisdictions deeds with provisions postponing complete operation until the grantor's death have been upheld as deeds of conveyance. *Abney v. Moore*, 106 Ala. 131; *Bunch v. Nicks*, 50 Ark. 367; *Latimer v. Latimer*, 174 Ill. 418; *Kelly v. Shimer*, 152 Ind. 290; *Abbott v. Holway*, 72 Me. 298; *Lauck v. Logan*, 45 W. Va. 251. There is no common ground on which these cases proceed. Perhaps the general view is that the deed operates as a conveyance *in praesenti*, with a life estate reserved somehow to the grantor. The bold attitude of the Maine court as displayed in *Abbott v. Holway*, *supra*, is refreshing. The provision in the deed there in question was: "This deed is not to take effect and operate as a conveyance until my decease." In an action of waste against the grantor's representative for cutting trees after the delivery of the deed the court held that the deed might operate "as the parties intended, and carry an estate to commence *in futuro* without the necessity of resorting to any subterfuges under which the estate thus created to commence *in futuro*, may be regarded as existing only by way of remainder or by virtue of some undisputed covenant to stand seized."

Why should not a deed be operative to convey an estate in fee simple or any other estate upon the death of the grantor, just as well as to create such an estate the first of next July? Of course no strings can be kept on such deed, it must be beyond the legal (as distinguished from the physical) power and control of the maker, in other words, it must have been delivered. Any such reservation would either negative delivery, and there would be no deed at all, or the instrument would be ambulatory, a quality attached to testamentary dispositions. To be sure, under the common law conveyances it was definitely established that estates of freehold could not be created to commence *in futuro*. "It has long been settled that, according to the common law, a limitation of an estate of freehold to commence *in futuro* is void." *Savill v. Bethell*, [1902] 2 Ch. 523, 540, citing *Buckler's Case*, 2 Co. Rep. 55a; *Barwick's Case*, 5 Co. Rep. 93b; *Roe v. Tranmer*, Willes 682, 2 Wils. 75. It was, however, possible to create uses, no matter how large the estate there-

in, *in futuro*, and when the Statute of Uses made the modes of creating uses effective as conveyances there was available a ready means of accomplishing what under common law modes of conveyancing had been impossible. *Savill v. Bethell*, *supra*; *Murray v. Kerney*, 115 Md. 514. The transaction giving rise to the future use of course had to be complete. If, for instance, the use was to arise out of a covenant to stand seized it is obvious that the covenant must have been sealed and delivered, in other words, it must have appeared that there was a completed legal act. And all such necessary steps must have been taken in the lifetime of the covenantor; if it should appear that it was his intention that no legal act should be consummated until after his death, obviously the whole transaction would fail.

Almost all deeds of conveyance take effect or can take effect under the Statute of Uses, and ordinarily courts show the greatest liberality in upholding deeds in order to accomplish what the parties intended, whatever may be the form. Thus in *Roe v. Tranmer*, *supra*, a deed in form a common law release was upheld as a covenant to stand seized; in *Havens v. Sea Shore Land Co.*, 47 N. J. Eq. 365, a deed with the words "remise, release, and quit claim" was given effect as a bargain and sale; in *Murray v. Kerney*, *supra*, an instrument that looked like an attempted will was upheld as a covenant to stand seized. Independently of the Statute of Uses a deed may effect the creation of a freehold *in futuro*, the statute of the state wherein lies the land being construed as making such result possible. The Maine statute provides that "a person owning real estate and having a right of entry into it, whether seized of it or not, may convey it, or all his interest in it, by a deed," etc. It was under this statute that *Abbott v. Holway*, *supra*, was decided. See also *Wilson v. Carrico*, 140 Ind. 533; *Ferguson v. Mason*, 60 Wis. 377; *Miller v. Miller*, 91 Kans. 1.

Any dispositive instrument to be fully operative only on the maker's death certainly bears one of the ear-marks of a will. In view of the foregoing, however, it seems clear that such fact cannot in itself be controlling. Where the circumstances disclose a completed legal act so far as the maker is concerned, with no express or implied power of revocation, such instrument would seem *prima facie* to be no testamentary disposition and the fact that complete operation is postponed until death should not be a sufficient circumstance to give the instrument an ambulatory character, a necessary quality of wills, *ex hypothesi* the instrument is complete and final as far as the maker is concerned and therefore cannot be ambulatory. When a court says, as did the Illinois court in *O'Brien v. O'Brien*, 121 N. E. 243, that "To constitute delivery it must clearly appear that it was the grantor's intention that the deed should pass title at the time and that he should lose control over the same," an element that has no place in delivery is made an essential part thereof.

"A will is an instrument by which a person makes a disposition of his property to take effect after his decease and which is *in its own nature* ambulatory and revocable during his life." JARMAN ON WILLS, (6th ed.) 27. Relatively slight circumstances added to the postponement of full operation until death may be sufficient to show a testamentary interest, in which case the instrument would of course be revocable despite apparent delivery. See

*Thorold v. Thorold*, 1 Phil. 1; *Fielding v. Walshaw*, 27 W. R. 492; *Ison v. Halcomb*, 136 Ky. 523. In *Fletcher v. Fletcher*, 4 Hare Ch. 67, Vice-Chancellor Wigram said: "The third question is whether the plaintiff is precluded from relief in this court, on the ground suggested, that this is a testamentary paper \* \* \* I have read the cases cited as to the instrument being testamentary \* \* \* I certainly was not prepared to find that the cases had gone so far as they have upon the subject. Those cases, however, are very distinguishable from the one before me. This is not a case where there is a general power of revocation reserved—a general power to dispose by will notwithstanding the execution of the instrument. In the cases referred to there has been a general revocation—or something like a revocation—of the party's right to deal with the property, notwithstanding the instrument; and the courts have held, that in such cases the instrument being one which was not to have effect until the death of the party—or rather, I would say, to use the language of Sir John Nicholl in one of the cases in which, until the death of the party, the instrument itself was not consummated—until then no conclusive effect could be given to it. If that does not occur, the instrument is not to be considered as testamentary." R. W. A.

TERMINATION OF A CONTINUING GUARANTY.—Several persons jointly and severally guaranteed to a bank the present and future obligations of a customer, stipulating that "the bank may grant extensions without lessening the liability" of the guarantors, that "this shall be a continuing guaranty, and shall cover all the liabilities which the customer may incur or come under until the undersigned, or the executors or administrators of the undersigned, shall have given the bank notice in writing to make no further advances on the security of this guaranty," and that "this guaranty shall not be affected by the death of the undersigned." One of the guarantors died and his executor wrote a letter "revoking the guaranty." Thereafter, the bank took renewals of the obligations then current and made fresh advances. What are the rights of the bank against the surviving guarantors and the executor of the deceased?

This question was presented to the Supreme Court of Alberta in *Northern Crown Bank v. Woodcrafts Ltd. et al.*, 11 Alberta L. R. 1. It was held that the executor's notice terminated the guaranty as to him, so that he was not liable for the fresh advances afterward made, but that, by reason of the provision authorizing extensions, he was not discharged, in respect of advances already made, by the renewals subsequently taken; and it was held that the notice in no way affected the liability of the surviving guarantors. No authority was cited except upon the last point. The executor and the surviving guarantors appealed to the Privy Council, whose judgment is reported under the name of *Egbert v. National Crown Bank*, [1918] A. C. 903. The judgment of the lower court was affirmed, but the opinion, by Lord Dunedin, squarely places the decision upon the ground that by the terms of the guaranty it was to remain in full force as to all of the guarantors "until there is notice given by each and all of the guarantors, the executors of any deceased co-signatory coming in his place." No authorities were cited.